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April 11, 2017

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
CG Docket No. 02-278**

Dear Ms. Dortch:

On April 7, 2017, the following individuals met with Zenji Nakazawa, Acting Public Safety and Consumer Protection Advisor to Chairman Pai: Lucia Lebens, Vice President of Government Relations and Public Policy, Navient Corp. ("Navient"); Joel Mayer, Managing Director and Associate General Counsel, Navient (via teleconference); Sara Brooke, TCPA Compliance Officer, Nelnet, Inc. ("Nelnet") (via teleconference); Mark W. Brennan and Wesley Platt of Hogan Lovells US LLP, Counsel to Navient; and Rich Benenson of Brownstein Hyatt Farber Schreck, LLP, Counsel to Nelnet. At the meeting, we discussed the Petition for Reconsideration of the Commission's August 11, 2016 Report and Order ("*Order*")¹ filed by Great Lakes Higher Education Corp. ("Great Lakes"), Navient, Nelnet, the Pennsylvania Higher Education Assistance Agency ("PHEAA"), and the Student Loan Servicing Alliance ("SLSA").²

During the meeting, we explained that the Commission should reconsider the *Order* to properly implement Congress's amendments to the Telephone Consumer Protection Act ("TCPA"), which exempt federal debt collection calls from the "prior express consent" requirement. Many key stakeholders, including for example federal government agencies, borrower groups, and loan servicers, have highlighted the need for and benefits of additional outreach to federal student loan borrowers. By reconsidering the *Order* as requested in the Petition, the Commission can advance Congress's goals of helping federal student loan borrowers get the information they need while promoting the timely repayment of billions of dollars of outstanding federal student loan debt.

We also discussed the overwhelming support in the record for granting the Petition. For example, the Coalition of Higher Education Assistance Organizations ("COHEAO"), National Association of College and University Business Officers ("NACUBO"), College Foundation, Inc. (the "Foundation"), American Bankers Association ("ABA") and Consumers Bankers Association ("CBA"),

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 31 FCC Rcd 9074 (2016) ("*Order*").

² Great Lakes, Navient, Nelnet, PHEAA, and SLSA, Petition for Reconsideration (filed Dec. 16, 2016) ("*Petition*"); see also Great Lakes, Navient, Nelnet, PHEAA, and SLSA, Consolidated Reply (filed Feb. 13, 2017) ("*Consolidated Reply*"). Unless otherwise noted, all filings referenced in this document are in CG Docket No. 02-278.

ACA International (“ACA”), and others each urged the Commission to grant our Petition,³ whereas only two filings opposed it.⁴

The increasingly one-sided record demonstrates that the Commission erred in allowing only three call attempts per month under the exemption. This decision ignored the wealth of empirical evidence that commenters and federal agencies had provided, which all pointed to a substantially higher limit. For example, Nelnet’s data showed that attempting up to 10 calls per month leads to an additional 42 percent more live contacts compared to attempting three calls per month.⁵ Based on this, Nelnet estimates that attempting 10 calls per month rather than three would help an additional 389,000 of its borrowers – which represent just a portion of federal student loan borrowers – resolve delinquencies each year.⁶

Navient’s data showed that it is able to resolve delinquencies more than 90 percent of the time it has a live conversation with a borrower and that 25 percent of delinquent federal student loan borrowers require 40 or more call attempts to reach.⁷ Navient’s data also showed that successful enrollment in income-driven repayment (“IDR”) plans can be increased by 50 percent by contacting the cell phones of previously delinquent borrowers.⁸ In addition, Navient provided a chart showing that a number of government entities require more than three call attempts per month to borrowers.⁹

The Department of Education (“Department”) warned specifically that three call attempts per month “would not afford borrowers sufficient opportunity to be presented with options to establish more reasonable payment amounts and avoid default.”¹⁰ The Consumer Financial Protection Bureau (“CFPB”) also proposed significantly higher limits in its debt collection rulemaking.¹¹ And the Department of the Treasury (“Treasury”) released a report last year that described the results of the first year of the Bureau of Fiscal Service’s (“Fiscal”) pilot program to service defaulted student loan debt.¹² Fiscal’s report highlights contemporary collection challenges and the benefits of additional outreach to borrowers.¹³ Among other things, the report explains that live contact with a borrower “is critical to identifying and enrolling in a repayment option” and that the student loan borrowers Fiscal reached “were often unaware of, or confused about, their repayment options.”¹⁴

³ See COHEAO Comments (filed Feb. 14, 2017); NACUBO Comments (filed Feb. 13, 2017); Foundation Reply Comments (filed Feb. 3, 2017); ABA and CBA Comments (filed Feb. 13, 2017); ACA Reply Comments (filed Feb. 13, 2017).

⁴ See NCLC *et al.*, Opposition to Petition for Reconsideration (filed Feb. 1, 2017) (“NCLC Opposition”); Letter from Maureen Mahoney, Policy Analyst, Consumers Union (filed Feb. 1, 2017).

⁵ See Nelnet Comments at 14 (filed June 6, 2016).

⁶ See Consolidated Reply at 4.

⁷ See Navient Comments at 9-10, 42-43 (filed June 6, 2016).

⁸ See *id.* at 34.

⁹ See, e.g., Letter from Mark W. Brennan, Counsel, Navient, to Marlene H. Dortch, Secretary, FCC, App. A (filed Aug. 2, 2016); *Order*, O’Rielly Dissent.

¹⁰ Letter from Ted Mitchell, Undersecretary, Department, to Marlene H. Dortch, Secretary, FCC, at 4 (filed July 11, 2016).

¹¹ CFPB, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* (July 28, 2016), <http://bit.ly/2axWSZH> (“CFPB Proposal Outline”).

¹² Department of the Treasury, Bureau of the Fiscal Service, *Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt* (2016), <http://bit.ly/2gCCF3Q>.

¹³ *Id.* at 5.

¹⁴ *Id.*

Revised data from the Department also highlights the need for and importance of additional borrower outreach. For example, in January 2017, the Department announced that it had overstated student loan repayment rates at most colleges and trade schools.¹⁵ The Department's revised data shows that at least half of all students at more than 1,000 colleges and trade schools had defaulted or failed to pay down at least \$1 on their debt within seven years – far more than the Department had previously estimated.¹⁶ Indeed, the Wall Street Journal compared the original data with the revised data and found that the original data inflated the repayment rates for 99.8 percent of all colleges and trade schools.¹⁷

Other data and reports that have become available since the *Order's* release similarly demonstrate that federal student loan borrowers will benefit from additional calls. For example, the Education Finance Council ("EFC") found that live contact with a student loan borrower led to the resolution of delinquency between 63 and 98 percent of the time, depending on the servicer, and that most of the time it takes only two calendar days to resolve a delinquency once live contact is established.¹⁸

The CFPB Student Loan Ombudsman also released an annual report that explained that current outreach efforts "may be insufficient to assist a substantial share of borrowers."¹⁹ The report recommended "[s]trengthening borrower communication" during critical periods, such as during a borrower's transition from the rehabilitation process to an IDR plan.²⁰

Meanwhile, no party has shown how the choice of "three" call attempts per month is supported by data or other empirical evidence in the record. Indeed, this limit lacks a rational basis and appears drawn from thin air. Worse, it will impede servicers' ability to help borrowers and is impossible to square with the data and input from numerous stakeholders, including other federal agencies. In contrast, a materially higher limit – such as three calls per week or 10 calls per month – would help allow meaningful borrower contact and effective collection of federal debts.²¹

We also discussed the fiscal impact of the Commission's rules. Treasury loses more than \$2.2 billion annually in defaulted federal student loan debt where servicers are not able to use the data-driven intelligence and efficiencies that advanced calling technologies enable. Accordingly, unreasonably limiting federal student loan servicers' ability to place calls under the exemption will materially harm the United States:

¹⁵ See, e.g., Andrea Fuller, *Student Debt Payback Far Worse than Believed*, WALL ST. J. (Jan. 18, 2017), available at <http://on.wsj.com/2l1LB5f>.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ Letter from Debra J. Chromy, President, EFC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Feb. 1, 2017).

¹⁹ See CFPB, *Annual Report of the CFPB Student Loan Ombudsman* at 47 (Oct. 2016), <http://bit.ly/2kJFtCh>.

²⁰ *Id.* at 46.

²¹ See, e.g., Petition at 5.

We also explained that the exemption covers certain calls to numbers other than those provided by borrowers. Many parties agree on this point, including the Association of Community College Trustees,²² NACUBO,²³ ACA,²⁴ and National Consumer Law Center (“NCLC”).²⁵ Such calls are made “solely to collect” a federal debt. Skip tracing and contacting individuals listed in a borrower’s loan file, for example, are often a critical tool for locating federal student loan borrowers.²⁶ In some cases, these activities are even required by the Department’s rules.²⁷ The CFPB’s debt collection proposals acknowledge the value of such calls and, in some cases, would allow up to six call attempts per week or one live communication with such individuals.²⁸

Moreover, calls to reassigned or wrong numbers must be allowed under the exemption to avoid undermining Congress’s intent. As Commissioner O’Rielly explained, the *Order*’s “outright prohibition on misdialed calls and calls to entities other than the borrower, as well as the effective ban on calls to reassigned numbers do not balance the benefits and concerns as the revised order claims. They run counter to the law.”²⁹ While we agree with NCLC that a database could help callers avoid some calls to reassigned numbers, no such database containing all reassigned numbers currently exists, and callers currently have no other viable means to entirely avoid reassigned numbers.³⁰

During the meeting, we also explained that the FCC took an impermissibly broad view of its jurisdiction under the amended TCPA. The Commission interpreted the amendments as creating an exception to the TCPA’s “prior express consent” requirement and providing broad new, freestanding authority for the FCC to regulate federal debt collection calls. This interpretation contradicts the statutory text and Congress’s intent.³¹ The interpretation also leads to absurd consequences and ignores the principle of sovereign immunity.³² Chairman Pai explained in his dissent that the interpretation “is unlawful and makes a dog’s breakfast of the TCPA.”³³ Commissioner O’Rielly called it “absurd.”³⁴ **None of the parties who commented on the Petition even attempted to defend the Commission’s interpretation of its jurisdiction.**

The FCC similarly exceeded its authority by adopting rules that impose limits other than on the “number” and “duration” of exempt federal debt collection calls. Although the Commission characterized its rules in the *Order* as limiting only the “number” and “duration” of calls,³⁵ the rules are in fact far broader in scope. For example, the rules restrict who may be called under the exemption, require calls and text messages to include certain disclosures, and create an opt-out

²² See Ass’n of Community College Trustees Reply Comments at 4 (filed June 21, 2016).

²³ See NACUBO Reply Comments at 2 (filed June 21, 2016).

²⁴ See ACA Comments at 11 (filed June 6, 2016).

²⁵ See NCLC *et al.* Reply Comments at 9 (filed June 21, 2016) (“[W]e do not think it necessary for callers to be limited to calling the numbers originally provided by the debtors.”)

²⁶ See, e.g., Navient Reply Comments at 23 (filed June 21, 2016).

²⁷ See 34 C.F.R. § 682.411(h), (m).

²⁸ CFPB *Proposal Outline* at 28.

²⁹ *Order*, O’Rielly Dissent.

³⁰ See, e.g., Consolidated Reply at 6; NCLC Opposition at 16-17.

³¹ See, e.g., Petition at 16-10.

³² See, e.g., *id.* at 19-21.

³³ *Order*, Pai Dissent.

³⁴ *Order*, O’Rielly Dissent.

³⁵ See, e.g., *Order* ¶¶ 1-2, 5, 10, 30-49, 61; 47 U.S.C. § 227(b)(2)(H).

requirement.³⁶ As we explained in our Petition, the Commission's rules are an abuse of discretion to the extent that they extend to elements beyond of the "number" and "duration" of calls under the new exemption.³⁷

We also discussed how low-income and minority borrowers would benefit from additional outreach. These borrowers are at greater risk of defaulting on their student loans, are disproportionately wireless-only, and tend to change telephone numbers more often compared to other student loan borrowers.³⁸ Indeed, the American Association of Community Colleges ("AACC") explained during the Commission's rulemaking that "[d]espite the relatively low borrowing rate (19%) compared to their four-year college counterparts, community college students struggle with persistently high default rates."³⁹ The United Negro College Fund ("UNCF") added that "[b]ecause African Americans have fewer financial resources, they borrow at higher rates, and in greater amounts, than White Americans to attend colleges."⁴⁰

AACC, UNCF, and others also emphasized the benefits of additional outreach to low-income and minority borrowers. For example, UNCF recommended allowing servicers to use advanced calling technologies, calling it "paramount" to maximize servicers' ability to reach borrowers prior to delinquency.⁴¹ AACC observed that delinquency and default create long-term consequences that are unique to student loan borrowers.⁴² Indeed, the data shows that Historically Black Colleges and Universities have been able to reduce their student default rates through innovative outreach techniques and best practices, including increased contact with borrowers.⁴³ Meanwhile, borrowers with limited plans would not be harmed, as NCLC has claimed.⁴⁴ Charges often are not incurred for missed or unanswered calls, and borrowers can stop the calls at any point under the Commission's current rules.⁴⁵

We also explained that the Commission should clarify and confirm that Federal Family Education Loan Program ("FFELP") loans are covered by the exemption. FFELP loans are "guaranteed by the United States" and fall squarely within the exemption. Indeed, the United States relied heavily on FFELP loans prior to 2010, at which point it began to issue 100 percent of federal student loans through the Direct Loan Program. Some confusion exists about this point, however. Although the Commission did not expressly address FFELP loans in the *Order*, a federal district court recently interpreted one of the *Order*'s footnotes (which discussed mortgage debts) to mean that the exemption covers FFELP loan calls only when the federal government's obligations as the guarantor have been triggered and are active.⁴⁶

³⁶ See *Order* ¶¶ 38-41, 44.

³⁷ See Petition at 19-21.

³⁸ See, e.g., Navient Comments at 24.

³⁹ AACC Comments at 1 (filed June 6, 2016) (describing student loan debt as a "serious problem for African Americans").

⁴⁰ UNCF Comments at 1 (filed June 6, 2016).

⁴¹ *Id.*

⁴² AACC Comments at 1.

⁴³ See Department, *Historically Black Colleges and Universities Fact Sheet: FY 2012 3-Year Cohort Default Rates* (2015), <http://www2.ed.gov/offices/OSFAP/defaultmanagement/dmd002.html>.

⁴⁴ See NCLC Opposition at 12-13.

⁴⁵ See, e.g., *Order* ¶¶ 38-42; Consolidated Reply at 5.

⁴⁶ See *Henderson v. United States Aid Fund*, 2017 WL 766548 (S.D. Cal. Feb. 28, 2017); *Order* ¶ 19 n.54.

Finally, we noted that the *Broadnet Ruling* raises separate, but important, issues.⁴⁷

The *Order* and the *Broadnet Ruling* are not “inextricably linked,” as NCLC has argued.⁴⁸ Not every call to collect a federal debt is placed by the federal government or an agent calling on its behalf. The Commission itself recognized this point in the *Broadnet Ruling*.⁴⁹ It explained that the decision “does not mean that Congress’ recent decision to except [federal debt collection calls] was unnecessary.”⁵⁰ Moreover, Congress did not change the definition of “person” under the TCPA or provide a mechanism to regulate non-“persons” by shifting its restrictions’ focus to the type of call being placed rather who is placing the call.

Pursuant to Section 1.1206(b) of the Commission’s rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

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⁴⁷ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling, 31 FCC Rcd 7394 (2016) (“*Broadnet Ruling*”).

⁴⁸ See NCLC Opposition at 3.

⁴⁹ See *Broadnet Ruling* ¶ 21 n.96.

⁵⁰ *Id.*